

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

JOEL RIVERA-DELGADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 07-1383 (JAF)

(Crim. No. 05-134 (HL))

OPINION AND ORDER

Petitioner, Joel Rivera-Delgado, brings this pro-se petition for post-conviction relief from a federal judgment pursuant to 28 U.S.C. § 2255. Docket No. 1. Respondent, the United States of America, opposes. Docket No. 17.

I.

Factual and Procedural History

On May 11, 2005, Petitioner was charged with one count of conspiracy to possess with intent to distribute fifty grams or more of crack cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. Case No. 05-134, Docket No. 40. The indictment alleged that the conspiracy lasted from about 1998 until May 2005. Id. Petitioner was personally charged with leading, organizing, and controlling this narcotics-trafficking conspiracy; using violence to enforce the conspiracy; and supervising the sale of drugs at several locations in Guayama and Arroyo, Puerto Rico. Id. at 3.

Petitioner moved for a change of plea on November 9, 2005, with assistance of counsel. Case No. 05-134, Docket No. 101. On

Civil No. 07-1383 (JAF)

-2-

1 January 19, 2006, Petitioner signed a waiver of his right to trial by
2 jury. Case No. 05-134, Docket No. 162.

3 On January 19, 2006, pursuant to a plea agreement, Petitioner
4 pled guilty to conspiracy to distribute between fifty and 150 grams
5 of crack. Case No. 05-134, Docket No. 164. Under the agreement,
6 Petitioner and the government agreed that Petitioner's base offense
7 level would be set at thirty-two, reduced by three for his acceptance
8 of responsibility, and increased by three for his significant role in
9 the conspiracy, resulting in an adjusted level of thirty-two. Id.
10 The consequent recommended term of imprisonment was from 121 to 151
11 months. Id.

12 On May 26, 2006, Judge Héctor Laffitte sentenced Petitioner to
13 imprisonment for 132 months with credit for time served, supervised
14 release for five years, and a \$100 assessment, and entered judgment
15 against Petitioner. Case No. 05-134, Docket No. 220. On May 4, 2007,
16 Petitioner moved to vacate his judgment under 28 U.S.C. § 2255 on the
17 grounds that his counsel was ineffective, that the waiver of his
18 right to appeal was unknowing, and that recent legal developments
19 entitle him to a lesser penalty. Docket No. 1. The government opposed
20 on October 31, 2008. Docket No. 17.

21 On November 28, 2008, we held an evidentiary hearing, per Rule
22 8 of the Rules Governing Section 2255 Proceedings, on Petitioner's
23 plea colloquy on January 19, 2006. Docket No. 24. In the course of
24 this hearing, we discovered evidence that Petitioner may be entitled
25 to a reduced sentence in light of recent amendments to the U.S.
26 Sentencing Commission Guidelines. Id.

Civil No. 07-1383 (JAF)

-4-

1 substantive law. See Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir.
2 1997).

3 **A. Waiver of Appeal**

4 Petitioner claims that his waiver of his right to appeal was
5 unknowing. Docket No. 1. Federal Rule of Criminal Procedure 11(b)
6 guards against coerced pleas by requiring the court to engage in an
7 extensive colloquy to ascertain a defendant's voluntariness and
8 awareness of his rights. While a guilty plea must be knowing,
9 voluntary, and intelligent, if a court has accepted a defendant's
10 plea per Rule 11, the defendant cannot go back on his own word by
11 petitioning under § 2255. United States v. Sánchez-Barreto, 93 F.3d
12 17, 23 (1st Cir. 1996).

13 The court discussed Petitioner's rights at length during his
14 plea colloquy. Docket No. 12. Petitioner represented that his plea
15 was both knowing and voluntary, and that he was consciously waiving
16 his right to appeal the length of his prison term. Id. The plea
17 agreement clearly spells out Petitioner's potential maximum liability
18 under the offense and his waiver of the right to appeal his sentence.
19 Case No. 05-134, Docket No. 164. This case essentially turns on a
20 swearing contest between Petitioner's assertions in this petition and
21 his previous sworn affirmations to this court. See Sánchez-Barreto,
22 93 F.3d at 23; see also Peguero v. United States, 526 U.S. 23, 29-30
23 (1999) (denying § 2255 relief due to petitioner's knowledge of his
24 right to appeal). We, therefore, deny Petitioner's claim on the issue
25 of waiver of appeal.

Civil No. 07-1383 (JAF)

-5-

1 **B. Ineffective Assistance of Counsel**

2 Petitioner argues that his sentence is unconstitutionally
3 tainted by ineffective assistance of counsel, to wit, (1) that
4 counsel failed to obtain the best possible plea agreement, (2) that
5 his plea was not fully knowing as he was unaware of possible
6 sentencing enhancements, (3) that his lawyer failed to file a timely
7 objection to the pre-sentence investigation report, and (4) that
8 counsel failed to file a direct appeal. Docket No. 1.

9 To establish ineffective assistance of counsel, Petitioner must
10 show both that his attorney's performance was deficient and that he
11 suffered prejudice as a result of the deficiency. Strickland v.
12 Washington, 466 U.S. 668, 686-96 (1984). To demonstrate deficient
13 performance, Petitioner must "establish that counsel was not acting
14 within the broad norms of professional competence." Owens v. United
15 States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S.
16 at 687-91). As to prejudice in guilty pleas, Petitioner "must show
17 that there is a reasonable probability that, but for counsel's
18 errors, he would not have pleaded guilty and would have insisted on
19 going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

20 First, Petitioner does not allege that he would not have pled
21 guilty and would have insisted on a jury trial, but for his lawyer's
22 intercession. See Docket No. 1. Accordingly, Petitioner fails to show
23 sufficient prejudice for ineffective assistance as to the first two
24 claims relating to his guilty plea. See Hill, 474 U.S. at 59.
25 Second, Petitioner does not point to any portion of the pre-sentence
26 investigation report that should have prompted counsel to object, see

Civil No. 07-1383 (JAF)

-6-

1 Docket No. 1, and, thus, fails to show prejudice, see Strickland, 466
2 U.S. at 686-96. Third, Petitioner's waiver of his right to appeal,
3 supra, forecloses the claim that counsel neglected to file an appeal.

4 **C. Remedy for Crack Cocaine Disparity**

5 At the hearing, Petitioner urged us to reconsider his judgment
6 in light of recent developments in sentencing for crack-related
7 offenses. Docket No. 1. Pursuant to an administrative directive dated
8 February 15, 2008, the District of Puerto Rico retrospectively
9 reforms federal sentences, sua sponte, to effect recent amendments to
10 the U.S. Sentencing Commission Guidelines pertaining to crack-related
11 offenses. Misc. No. 08-31, Docket No. 1. As Petitioner admitted
12 responsibility for over fifty grams of crack, Docket No. 12,
13 Petitioner's base offense level under the amended guidelines is
14 thirty, a reduction of two points from the previous version of the
15 guidelines. See U.S. Sentencing Guidelines Manual § 2D1.1(c) (2008).
16 Based on Petitioner's criminal history category at one, Case No. 05-
17 134, Docket No. 202, the guideline sentencing range should be from 97
18 to 121 months' imprisonment, see Sentencing Guidelines (Sentencing
19 Table). As the mandatory statutory minimum sentence for crimes
20 involving fifty or more grams of crack is 120 months, 21 U.S.C.
21 § 841(b)(1)(A)(iii), the effective sentencing range is 120 to 121
22 months. Pursuant to 18 U.S.C. § 3582(c)(2), we reduced Petitioner's
23 sentence by eleven months, to 121 months' imprisonment. See Case
24 No. 05-134, Docket No. 266.

Civil No. 07-1383 (JAF)

-7-

1 **IV.**

2 **Conclusion**

3 For the foregoing reasons, we **DENY** § 2255 relief. However, the
4 court notes that, previously, we reduced Petitioner's term of
5 imprisonment to 121 months. See Case No. 05-134, Docket No. 266. As
6 of today, that part of Petitioner's request is moot.

7 **IT IS SO ORDERED.**

8 San Juan, Puerto Rico, this 24th day of February, 2009.

9 S/José Antonio Fusté
10 JOSE ANTONIO FUSTE
11 Chief U.S. District Judge